## I. The Legal Nature of an Action to Enforce a Monetary Arbitration Award Triggers the Seventh Amendment Right to Jury Trial — When the Scope of Judicial Review is in Question.

The phrase "Suits at common law" in the Seventh Amendment refers to "suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered."[10] In determining whether a particular action will resolve legal rights, the Supreme Court examines both the nature of the issues involved and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature."[11]

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same way other contracts are to be interpreted and enforced. Congress through the Federal Arbitration Act "intended courts to enforce [arbitration] agreements into which parties had entered, . . . and to place such agreements upon the same footing as other contracts." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 271, 115 S. Ct. 834, 838, 130 L. Ed. 2d 753 (1995) (citation & internal quotations omitted).

10. *Teamsters v. Terry*, 494 U.S. at 564, 110 S. Ct. at 1344, *quoting Parsons*, 28 U.S. at 446, 3 Pet. at 447 (internal quotations omitted, emphasis in original).

11. *Id.*, 494 US at 565, 110 S. Ct. at 1345 (citation & internal quotations omitted).

While it is well-settled that in the 18th century an action to set aside an arbitration award was considered *equitable*,[12] it is equally true that an action to enforce an arbitration award for money damages was considered *legal*.[13] Prescott's action to

12. *Prescott II*, App. A at 12a & n. 20, *citing Teamsters v. Terry*, 494 U.S. at 566, 110 S. Ct. at 1345, *citing* 2 J. Story, Commentaries on Equity Jurisprudence § 1452, pp. 7[illegible]9-90 (13th ed. 1886).

13. Numerous commentators agree that when an arbitration award required the payment of money — as distinguished from an award requiring the performance of an act — the proper remedy was at law rather than at equity. *See, e.g.*, S. Symons, A Treatise on Equity Jurisprudence § 1402, p. 1037 (5th ed. 1994) ("For example, awards directing the conveyance of land, etc. [are within the jurisdiction of the equity court]; but not an award directing merely a payment of money.") (citations omitted); G. Clark, Equity § 64, pp. 92-93 (1954)

> (If a contract is made to submit a matter to arbitration or valuation and the arbitrators are appointed and make an award, the award is treated just as if it were a contract between the parties; e.g., if the award is to convey land, equity will give specific performance of it; if it is to pay money, the proper remedy is at law.)

(citations omitted); N. Fetter, Handbook of Equity Jurisprudence § 178, 269-70 (1895)

> (The award of the arbitrators, however, is treated as a contract between the parties, and will be enforced where a contract would be enforced, but not otherwise. An award to do anything in specie, as to convey an estate or assign securities, will therefore be enforced [by a court of equity], but not an award to pay money.)

(citations omitted). *Accord* J. Story, Commentaries on Equity Jurisprudence § 1458, pp. 680-81 & n.1 (1836 ed. reprinted by Arno Press, Inc. 1972), the 1886 edition of which is cited in *Teamsters v. Terry* (see the foregoing footnote).

enforce the arbitration award is a legal action seeking a legal remedy, to which the Seventh Amendment jury right attaches.

The appellate court limited its Seventh Amendment analysis to NCS' motion to *vacate* the award as if it were the sole underlying action, and ignored the significance of Prescott's action to *enforce* the award in the district court.[14] According to the Supreme Court, "[a]s long as any legal cause is involved the jury rights it creates control."[15] The mere fact that both legal and equitable issues arise in the same suit can not serve to bar jury trial.

In *Dairy Queen, Inc.*, respondents sought equitable relief in the form of an accounting in addition to a money judgment for breach of contract — "a claim which is unquestionably legal."[16] Petitioner asserted that the contract in question had been modified by a subsequent oral agreement. According to the Supreme Court, this defense "*present[ed] a purely legal question*" because:

> Such a defense goes to *the question of just what, under the law, the contract between the respondents and petitioner is* and, in an action to collect a debt for breach of a contract between these parties, *petitioner has a right to have the*

14. *See Prescott II*, App. A at 12a.

15. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, 82 S. Ct. 894, 897, 8 L. Ed. 2d 44 n.8 (1962), *quoting Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961)(internal quotations omitted).

16. 369 U.S. at 475-76, 82 S. Ct. at 898-99.

> *jury determine* not only whether the contract has been breached and the extent of the damages if any but also *just what the contract is.*[17]

The appellate court correctly concluded that NCS "seeks a jury trial only on the issue whether it contracted to expand the scope of review of the [arbitration] award, not the award itself."[18] An issue is triable by jury if it is legal in nature as opposed to equitable.[19] Declaratory relief may be legal or equitable depending on the basic nature of the underlying issues and the remedy sought.[20] In this case, as in *Dairy Queen*, the issue of contractually reserved appeal rights (*i.e.*, just what the contract is) is a legal issue.

## II. A Legal Issue Overrides an Equitable Issue When it Comes to Jury Trial.

For purposes of Seventh Amendment analysis, "nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the court."[21] The proper procedure in the district court would have been for the district court to decide whether NCS was

17. 369 U.S. at 479, 82 S. Ct. at 900 (emphasis added).

18. *Prescott II*, App. A at 12a.

19. *Teamsters v. Terry*, 494 U.S. at 564, 110 S. Ct. at 1344.

20. *See id.*, 494 U.S. at 565, 110 S. Ct. at 1345. *Simler v. Connor*, 372 U.S. 221, 223, 83 S. Ct. 609, 611, 9 L. Ed. 2d 691 (1963).

21. *Ross v. Bernhard*, 396 U.S. 531, 540, 90 S. Ct. 733, 739, 24 L. Ed. 2d 729 (1970).

entitled to equitable relief (*i.e.*, setting aside of the arbitration award) only after the jury decided the issue of appeal rights based upon the intentions of the parties.[22] The lower courts should have protected constitutional rights in accord with Supreme Court precedent, which provides that

> where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[23]

The actions of the lower courts, however, conflict with decisions of the Supreme Court and violate the Seventh Amendment to the Constitution of the United States.

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22. *See Thermo-Stitch, Inc.*, 294 F.2d at 490 ("the court decides whether equitable relief is called for on the basis of the jury's findings of fact").

23. *Dairy Queen, Inc.*, 369 U.S. at 472-73, 82 S. Ct. at 897, *quoting Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 510-11, 79 S. Ct. 948, 957, 3 L. Ed. 2d 988 (1959).

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court granted review of this matter.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DECIDED JULY 8, 2005**

**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

No. 04-31182

Summary Calendar

Decided July 8, 2005

Pamela L. PRESCOTT,

Plaintiff-Appellee

v.

NORTHLAKE CHRISTIAN SCHOOL; et al,

Defendants

Northlake Christian School,

Defendant-Appellant.

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

*Appendix A*

PER CURIAM:*

Defendant-Appellant Northlake Christian School ("NCS") appeals the district court's order enforcing an arbitration award against NCS obtained by its former employee, Plaintiff-Appellee Pamela Prescott. We affirm the district court's enforcement order.

## I. FACTS AND PROCEEDINGS

NCS's appeal is the latest chapter in its five-year-old employment dispute with Prescott; indeed, this is the second time that these parties have come before us regarding the validity of the arbitrator's award.[1] As we detailed the facts underlying this dispute in our *Prescott I* opinion, we shall not repeat them here. We shall, however, briefly review the background proceedings for the sake of clarity. After being fired from her job as principal at NCS, Prescott brought suit in the district court, alleging Title VII and various state law claims, including breach of her employment contract. After NCS moved successfully to compel arbitration, such proceedings were conducted according to the Rules of Procedure for Christian Conciliation ("Rules") of the Institute for Christian Conciliation ("ICC"). In arbitration, Prescott prevailed on her breach of contract claim and was awarded approximately $ 150,000 in damages

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1. *See Prescott v. Northlake Christian Sch.*, 369 F.3d 491, 493 (5th Cir.2004) (hereinafter "*Prescott I*").

for reputational harms and loss of future income. In reaching his decision, the arbitrator determined that NCS had wrongfully discharged Prescott by failing to follow Biblical precepts, as required in her employment contract; specifically, the conflict resolution process described in Matthew 18.[2]

NCS immediately returned to federal district court, this time requesting vacatur of the arbitrator's award. NCS insisted that, even though the parties' arbitration agreement specified that proceedings would be conducted under the Rules of the ICC and the Montana Uniform Arbitration Act ("MUAA"),[3] the parties had actually contracted for plenary judicial review of the arbitration proceedings when they struck through language in NCS's form arbitration agreement, thereby making communications between the parties confidential and inadmissible in a court of law. The parties had also inserted a hand-written provision stating that "[n]o party waives appeal rights, if any, by signing this agreement."[4]

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2. All employment contracts at NCS require individuals to follow this process, as well as other provisions of scripture in their every-day dealings with students and other employees.

3. Mont.Code Ann. § 27-5-101 *et seq.* The parties agreed to be bound by the Rules of Procedure for Christian Conciliation of the ICC. In their arbitration agreement, the parties also agreed to conduct the arbitration proceedings according to the MUAA, which provides the relevant standard of review and other procedural requirements not covered by the ICC rules.

4. Although, generally, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et. seq., governs a federal court's consideration of matters involving arbitration, parties are free to contract for expanded

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NCS reasoned that, under this expanded scope of review, the district court had jurisdiction to address and hold that the arbitrator misconstrued Prescott's employment contract as well as applicable Louisiana law. NCS also argued that the arbitrator exceeded his authority and was impermissibly biased—both grounds for vacatur under the MUAA.

The district court ruled against NCS, holding that the parties had not expanded the scope of judicial review of the arbitration proceedings and that NCS had not shown that it was entitled to vacatur under the MUAA's narrow standard of judicial review of proceedings in arbitration. NCS appealed this ruling to us in *Prescott I*.

Holding that the parties' handwritten strike-outs and their insertion to their arbitration agreement were ambiguous, we vacated the district court's order and remanded with instructions for the district court to hold an evidentiary hearing. In so doing, we directed the district court to "take evidence on and contractually interpret the circumstances surrounding the *making* of the provision."[5] On remand, the district court held an evidentiary hearing as instructed, after which it again concluded that the parties had not contractually expanded the scope of review and again ordered enforcement

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judicial review of their arbitration proceedings. *Action Indus. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir.2004); *Harris v. Parker Coll. of Chiropractic*, 286 F.3d 790, 793 (5th Cir.2002); *Gateway Technologies, Inc. v. MCI Telecommunications, Corp.*, 64 F.3d 993, 996-97 (5th Cir.1995).

5. 369 F.3d at 497-98 (emphasis added).

of the arbitrator's award for the reasons given in its previous opinion.

In the instant appeal, NCS challenges the district court's determination that the arbitration agreement did not expand the parties' right to judicial review on appeal. In addition, NCS now contends that it was entitled to a jury trial on the question of *interpretation* of the arbitration agreement, not just the *making* of that agreement, reiterating the contention that the district court erred in its earlier order enforcing the arbitration award in favor of Prescott.

## II. DISCUSSION

### A. The Ambiguous "Appeal Rights" Clause

#### 1. Standard of Review

We review the district court's findings of facts for clear error.[6] "The burden of showing that the findings of the district

6. *Prescott I*, 369 F.3d at 494. We erroneously stated in *Prescott I* that this provision and any ambiguities therein must be construed against Prescott, as she had added the language. *Id.* at 497 n. 10. It is undisputed at this time that NCS added the language, "if any" to the contract, thus this language should be construed against NCS. *See* La. Civ.Code Ann. § 2056 ("In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text."); *Lifemark Hosp., Inc. v. Liljeberg Enters.*, 304 F.3d 410, 440 (5th Cir.2002) (construing contract language against drafting party pursuant to Louisiana law). The parties' employment contract contained a clause providing that the contract's language should be construed according to Louisiana (Cont'd)

court are clearly erroneous is heavier if the credibility of witnesses is a factor in the trial court's decision."[7] "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole."[8]

2. The Evidentiary Hearing

On remand from *Prescott* I, the district court heard testimony from the parties as to whether, in amending their arbitration agreement, they had intended to expand the scope of any subsequent judicial review. Prescott testified that she understood at the time that she had only a limited right of appeal but that she wanted to confirm in writing that, by signing the arbitration agreement, she was not waiving or curtailing even this limited right of review. To that end, she requested that the parties include a clause stating that "No party waives appeal rights by signing this agreement." Prescott testified further that NCS twice rejected her suggestion but finally agreed to accept her modification on the condition that the words "if any" be inserted after "appeal rights."

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law; although the arbitration agreement did not contain such a provision, it is a contract entered into in Louisiana by two Louisiana parties, and therefore we employ Louisiana law in our analysis of the contractual language. *Prescott I*, 369 F.3d at 496.

7. *Coury v. Prot*, 85 F.3d 244, 254 (5th Cir.1996) (citation omitted).

8. *United States v. Valencia*, 44 F.3d 269, 272 (5th Cir.1995).

Boyd Leahy testified on behalf of NCS that the clause was added to preserve all appeal rights in the event that there was no successful mediation. He claimed that the words "if any" were added to the clause because, if the mediation had been successful, there would have been no appeal.[9]

NCS also argued to the district court that the conduct of the parties demonstrated their belief that they had contracted for appeal rights beyond those guaranteed by the MUAA. NCS emphasized that (1) Prescott had hired a court reporter to transcribe the entire arbitration hearing, (2) during the arbitration proceeding, the parties discussed possible appeal to the Fifth Circuit, (3) Prescott proffered evidence for consideration on appeal, and (4) she agreed to the arbitrator's retaining custody of disputed evidence pending final appeal.

The district court ruled in favor of Prescott, holding that the phrase "if any" was inserted to preserve appeal rights normally guaranteed by the MUAA. He interpreted "if any" to mean "if there are any," a phrase that implies the possibility of none. "In other words," ruled the district court, "the parties agreed to not waive appeal rights *if there are any.*" NCS's insistence on adding the words "if any" to the contract, the court concluded, demonstrated its own concern that, without these words, Prescott might be allowed to appeal the arbitrator's decision on grounds not permitted by the MUAA. The court stated that NCS's explanation that "if any" referred to the possibility that there would be no appeal rights if mediation was successful "makes no sense because it is

9. Leahy added, however, that he understood that he agreed to arbitration with a right of appeal in the case of *mistake or unfair decision,* the same right of appeal guaranteed under the MUAA.

obvious that a successful mediation would mean there would be no need for an appeal." The only reason for including language regarding appeal rights under these circumstances, reasoned the court, "was to clarify the parties' intention in the event there was an arbitration hearing and decision."

In contrast, the district court found credible Prescott's explanation that she was concerned that the arbitration agreement stated that "arbitration will be the exclusive remedy for this dispute and . . . we may not later litigate these matters in civil court" without reference to the appeal rights available under the MUAA. And, the court disagreed with NCS's characterization of the parties' conduct, finding that it indicated only that they were aware that *some* ground for appeal was available, not necessarily that they would be entitled to plenary judicial review.

NCS also cites Prescott's communications with the ICC prior to the mediation as evidence of her intent to gain plenary appeal rights, noting that she stated in a letter protesting the ICC's jurisdiction that she intended to participate, "reserving every right to exhaust every appeal." This proves nothing, however; a reading of the entire letter shows that Prescott's primary concern was her perception that the ICC was biased in favor of NCS. Her letter makes clear that she felt herself cheated out of a fair trial and considered the ICC a willing party in "this evil attempt to permanently damage my professional and personal integrity . . . thus becoming a biased party supporting NCS in this action." Prescott also referred to the ICC as "a biased party to this conspiracy to effectively strip away my guaranteed Constitutional

rights. . . ." The MUAA provides for vacatur of awards granted by a biased arbitrator.[10]

The district court committed no error in determining that the parties did not intend to expand the scope of judicial review. The court's conclusion—that Prescott intended only to preserve what rights she thought she had and that NCS intended to ensure that she did not gain any appeal rights to which she was not already entitled—is plausible. Even if the court had not credited Prescott's explanation that she wished only to preserve her rights under the MUAA and instead had credited NCS's explanation that Prescott wanted plenary appeal rights, NCS's insertion of the words "if any" effectively nullified any such effort on her part. Thus, when the words furnished by each party are construed against the writer,[11] and after noting that NCS made the final change to the language, it is logical to assume that, in the final revised draft of the arbitration agreement, the parties intended nothing more than to reiterate that the appeal rights enumerated in the MUAA—and only such appeal rights—would be available to them. We affirm the district court's ruling that the parties did not expand the scope of review available to them under the MUAA.

B. Jury Trial

After we remanded this case in *Prescott I* for an evidentiary hearing on the meaning of the contract's wording,

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10. Mont Code Ann. § 27-5-312(1)(b).

11. *See* La. Civ. Code Ann. § 2056.

NCS requested a jury trial on the interpretation of the contract. The district court denied this request, noting that motions to enforce or vacate an arbitration award carry no right to a trial by jury. On appeal, NCS asserts that the FAA permits parties to demand a jury trial to resolve factual issues surrounding the making of an arbitration agreement,[12] and that this right should also apply to interpretation of an arbitration agreement as well.

Neither the FAA nor the MUAA provide for a jury trial under these circumstances. Unlike the FAA, the MUAA makes no explicit guarantee of a trial by jury at any stage of arbitration-related litigation.[13] As for the FAA, its § 4 allows for a jury trial only to resolve fact issues surrounding "the *making* of an arbitration agreement"[14] and applies in proceedings to compel arbitration. Although the "making of an arbitration of an agreement" could be broadly construed to include any factual issue surrounding the writing of the arbitration agreement, we have not done so. In fact, we have explicitly interpreted § 4 to require that a party make "at least some showing that under prevailing law, he would be

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12. 9 U.S.C. § 4.

13. *Compare* Mont.Code Ann 27-5-115(1), (2) (directing courts to proceed summarily to the determination whether there is an agreement to arbitrate as "[s]uch an issue, when in substantial and bona fide dispute, shall be immediately and summarily tried.") *with* 9 U.S.C. § 4 ("If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.").

14. 9 U.S.C. § 4 (emphasis added).

relieved of his contractual obligation to arbitrate if his allegations proved to be true."[15] The party must put the *existence* of the agreement to arbitrate itself at issue to create a jury-triable issue.[16] NCS is not seeking a jury determination whether the parties contracted to arbitrate disputes; they clearly did. NCS seeks a jury determination only as to the meaning of particular words of the agreement that the parties acknowledge having made.

In contrast, neither § 10 of the FAA (the portion governing judicial review of an arbitration award) nor any other part of the FAA explicitly authorizes jury trials on issues of interpretation of other aspects of an arbitration agreement. Obviously, NCS's argument relates to the enforceability of the contract, an issue that we have expressly held not to be encompassed within § 4's jury trial provision.[17]

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15. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154 (5th Cir.1992). "While Section 4, by its terms, applies to proceedings to compel arbitration, its provisions have been deemed applicable also in instances when the proceeding is initiated by the party seeking to avoid arbitration." 8 James Wm. Moore et al., Moore's Federal Practice § 38.33 (3d ed.1999).

16. *Id.* "[I]t is well-established that '[a] party to an arbitration agreement cannot obtain a jury trial merely by demanding one.'" *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 710 (5th Cir.2002) (quoting *Dillard*, 961 F.2d at 1154).

17. *See Am. Heritage Life, 294 F.3d at 710* (holding that party's argument that an arbitration agreement was unconscionable, lacked mutuality, and failed to result from a meeting of the minds did not impact the "making" of the arbitration agreement, as required by statute, because a party contesting the "making" of an agreement for purposes of § 4 must put the very existence of the contractual agreement to arbitrate at issue).

NCS also contends that it is entitled to trial by jury by virtue of Federal Rule of Civil Procedure 38. But of course, Rule 38 only *preserves* the parties' right to jury trial in cases in which the right is guaranteed by the Seventh Amendment or is provided by statute.[18] In determining whether a party enjoys a right to a trial by jury when the statute does not expressly grant one, we examine (1) the nature of the issues involved, comparing them to actions brought in 18th century England before the merger of law and equity, and (2) the nature of the remedy sought, whether legal or equitable.[19] "In the 18th century, an action to set aside an arbitration award was considered equitable."[20] And, even though NCS ultimately seeks vacatur of the arbitrator's award for damages, it seeks a jury trial only on the issue whether it contracted to expand the scope of review of the award, not the award itself. NCS thus seeks only a declaration of its rights, not a legal award of damages. NCS enjoys neither a Seventh Amendment nor a statutory right to a trial by jury under these circumstances.

Finally, in our *Prescott I* remand for an evidentiary hearing, we only ordered the district court "to take evidence on and contractually interpret the circumstances surrounding

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18. *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1214 (5th Cir.1986); 8 James Wm. Moore et al., Moore's Federal Practice § 38 (3d ed.1999).

19. *Tull v. United States*, 481 U.S. 412, 417-18, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

20. *Teamsters v. Terry*, 494 U.S. 558, 566, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (citations omitted).

the making of the [review] *provision.*"[21] We did not order the district court to conduct a jury trial. The district court did not abuse its discretion by declining NCS's request for a jury trial.[22]

C. Motion to Vacate Award

As the district court did not clearly err in its determination that the parties did not intend to expand their right of judicial review, we must consider whether the district court properly denied NCS's motion to vacate the arbitration award under the narrow standard of review applicable to such an issue. NCS insists that the arbitrator's award must be vacated because (1) he erroneously concluded that NCS had breached its employment contract with Prescott and that she was entitled to damages—conclusions that NCS contends are in conflict with Louisiana law—(2) the arbitrator exceeded his authority, and (3) the arbitrator was biased against NCS.

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21. *Prescott*, 369 F.3d at 498 (emphasis added).

22. *Becker v. Tidewater, Inc.*, No. 04-30243, 2005 U.S.App. LEXIS 5124 at * 4 (5th Cir. Mar. 30, 2005)(holding that district court did not abuse its discretion by denying party's request for jury trial when party had no independent right to jury trial and court of appeals had remanded case without instructions that district court provide such a trial).

## *Appendix A*

1. Standard of Review

We review a district court's confirmation or vacatur of an arbitration award *de novo.*[23] The district court's scope of review of an award by the arbitrator, however, is extremely limited. Although the FAA would normally provide the grounds for vacatur, in this case the parties' arbitration agreement specifies that "[t]his agreement is subject to arbitration pursuant to the Montana Arbitration Act, Title 27, Montana Code Annotated," which statement expresses the parties' binding agreement that Montana's *procedural* rules will govern the entire arbitration process, including the review of the award.[24] And, the Rules of the ICC do not purport to change the scope of judicial review of its arbitration decisions, stating that "[t]he arbitration decision is final and cannot be reconsidered or appealed except as provided by Rule 41 and/or *civil law.*"[25] As we noted in *Prescott I,* the MUAA provides substantially identical

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23. *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir.1995).

24. *See Hughes Training Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir.2001) (concluding that, despite provision in arbitration agreement stating that FAA governed motions to compel or enforce arbitration, the agreement's specific provision stating that "the arbitration process shall be conducted in accordance with the Employment Problem Resolution Procedures" meant that "[t]he procedural rules pertained to the entire arbitration process, which included the review of arbitration awards.").

25. ICC Rule 42 (emphasis added).

grounds to the FAA for vacatur by the district court:[26] to wit,

> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (c) the arbitrators exceeded their powers;[27]

The MUAA does not allow for judicial review of arbitration awards on the merits of the controversy.[28] (As NCS has not

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26. 369 F.3d at 494-95. The FAA permits only strictly limited review—it has been called "the narrowest known to the law." *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir.1995) (quoting *Litvak Packing Co. v. United Food & Commercial Workers*, 886 F.2d 275, 276 (10th Cir.1989)).

27. Mont.Code Ann. § 27-5-312. An award may also be vacated if the arbitrators refused to postpone a hearing despite sufficient cause being shown or if there was no arbitration agreement and the party participating in the hearing objected on this basis. *Id.*

28. *Geissler v. Sanem*, 285 Mont. 411, 949 P.2d 234, 238 (Mont.1997) (holding party unentitled to vacatur of arbitration award as it had not demonstrated that arbitrator had exceeded his power, "[i]nstead of presenting evidence to the District Court that the panel exceeded its power, Geisslers' appeal alleged only that the panel had arrived at the wrong result."); *May v. First Nat'l Pawn Brokers*, 269 Mont. 19, 887 P.2d 185, 187 (Mont.1994) ("The MUAA clearly

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argued that the arbitrator manifestly disregarded the law, we do not consider this ground for vacatur.[29])

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(Cont'd)

does not authorize judicial review of arbitration awards on the merits of the controversy."). The standard is the same under the FAA. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) ("Courts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."); *Six Flags Over Tex. v. IBEW*, 143 F.3d 213, 214 (5th Cir.1998) ("The courts have no authority to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract."); *Int'l Bhd. of Elec. Workers v. Green Corp.*, 725 F.2d 264, 268-269 (5th Cir.1984) ("We refrain from commenting on the correctness or incorrectness of the arbitrator's factual findings and legal conclusions. That is not our function. Nor shall we impress the law of corporations, contracts, evidence, or other legal rules and concepts upon this situation and then measure the arbitrator's actions against them. We consider that to be inconsistent with the national arbitration policy and the many decisions limiting judicial oversight. What we might have done to resolve the factual and legal issues were we the deciding body is of no moment. We are not the trier of fact nor the elucidator of the bargaining agreement. The arbitrator, by active choice of the parties, exclusively performs those functions.").

29. Courts reviewing arbitration awards pursuant to the MUAA or the FAA may also vacate awards if an arbitrator has demonstrated "manifest disregard" for the law, a non-statutory court-approved exception to these statutes. *Geissler*, 949 P.2d at 237-38 (holding that district courts may vacate arbitration awards if the arbitrator "is aware of a clearly governing principle of Montana law, and blatantly refuses to follow it . . ."); *Prestige Ford v. Ford Dealer Computer Servs.*, 324 F.3d 391, 397 (5th Cir.2003) (same).

2. Mis-interpretation of Louisiana Law

NCS dedicates the bulk of its appellate brief to demonstrating that the arbitrator misconstrued both Louisiana law and the contract between the parties. NCS contends that, under Louisiana law, it did not breach its contract with Prescott and therefore cannot be liable for damages. Arbitrators have the power to decide issues of fact and law under the MUAA[30] and, as should be obvious, neither the MUAA nor the FAA permits either the district court or this court to review the merits of the controversy underlying this arbitration award.[31] We decline to consider NCS's attacks on the arbitrator's interpretation of law or fact.

3. Exceeding the Powers of the Arbitrator

An arbitrator exceeds his powers when he acts outside the limits of the authority granted to him by the arbitration agreement, such as deciding issues that have not been submitted to him[32] or acting contrary to express provisions of that agreement.[33] As a general rule, the fact that the remedy

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30. *Paulson v. Flathead Conservation Dist.*, 321 Mont. 364, 91 P.3d 569, 574 (Mont.2004).

31. *See supra* at n. 27.

32. *Nelson v. Livingston Rebuild Ctr., Inc.*, 294 Mont. 408, 981 P.2d 1185, 1187 (Mont.1999).

33. *Paulson*, 91 P.3d at 574; *Terra W. Townhomes, L.L.C. v. Stu Henkel Realty*, 298 Mont. 344, 996 P.2d 866, 871 (Mont.2000).

ordered by an arbitrator is inconsistent with state law is not grounds for vacating an award.[34]

NCS argues that § 27-5-113 of the MUAA exempts employment agreements from the automatic application of many other portions of the code, including § 27-5-312(2), which states that the fact that an arbitrator has awarded damages that a court could or would not is not grounds for vacatur. Prescott responds that § 27-5-113 of the Montana Code refers only to labor agreements, as it is titled "Application to Labor Agreements."[35] Neither party cites any case law in support of their arguments or stating the converse, that an arbitrator's award of damages inconsistent with state law *is* grounds for vacatur. As NCS's argument appears to be in conflict with established law, we decline to adopt this expansive construction of Montana's statute.[36]

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34. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (holding that, as parties had incorporated arbitration rules permitting arbitrator to award punitive damages, such damages were permissible despite New York law prohibiting award of such damages in arbitration proceedings); *Nelson*, 981 P.2d at 1188 (Mont.1999) ("Without reaching the merits of whether the damages were correctly awarded in the first instance, we agree that the arbitrator did not exceed his powers by awarding them. The fact that the damages might not have been awarded by a court of law is not grounds for vacating the award.") (citing Mont.Code Ann. § 27-5-312(2)).

35. Mont.Code Ann. § 27-5-113.

36. *See Paulson*, 91 P.3d at 574 (holding that awards will be vacated only if not rationally related to the parties' agreement);

(Cont'd)

NCS argues that the arbitrator also exceeded his powers by awarding on a matter not submitted for resolution and by awarding damages inconsistent with Louisiana law, despite the employment contract's provision requiring that Louisiana law govern the employment relationship. An award is sustainable against a challenge that the arbitrator has exceeded his power if the award can be "rationally inferred" from the contract.[37] That we may disagree with the arbitrator's interpretation of both law and fact, including his determination of the kinds of damages allowed by the contract, is not a grounds for vacatur.[38] "To draw its essence from the contract, an arbitrator's award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter and purpose of the agreement. The award must, in some logical way, be derived from the wording or purpose of the contract."[39]

First, the statement of issues that the parties submitted to the ICC for resolution through conciliation included

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(Cont'd)

*Nelson*, 981 P.2d at 1188 (stating that fact that court could not have awarded same damages as arbitrator was not grounds for vacatur in employment dispute between individual employee and company).

37. *Terra W. Townhomes*, 996 P.2d at 871; *Glover v. IBP, Inc.*, 334 F.3d 471, 475 (5th Cir.2003).

38. *See id.*

39. *Glover*, 334 F.3d at 475 (quoting *Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir.1990) (internal quotation marks and citations omitted)).

determinations of, *inter alia,* (1) whether NCS wrongfully terminated Prescott; (2) what damages, if any, does NCS owe Prescott; and (3) how and when should damages be paid. The issues whether NCS breached Prescott's employment contract by wrongfully discharging her, as the arbitrator ultimately found, and what damages should be awarded for that reason, were plainly placed before the arbitrator by the parties.

Second, the arbitrator's award of damages is not contrary to express contractual provisions. In contending that the award is contrary to the contract, NCS argues that, because the parties included a Louisiana choice-of-law provision in the employment contract, they agreed to have their employment relationship governed by Louisiana law. Therefore, reasons NCS, the arbitrator was limited to awarding damages that would be available under Louisiana law.[40] The narrow scope of our review limits us to inquiring

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40. The Supreme Court has rejected a similar argument in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995). In *Mastrobuono,* the parties' contract included a New York choice of law provision in addition to an arbitration provision, stating that arbitration proceedings would be governed by the rules of the National Association of Securities Dealers ("NASD"). 514 U.S. at 58-59. Although the NASD rules allowed arbitrators to award "damages" without reference to punitive damages, New York case law forbade arbitrators from awarding punitive damages, even though punitive damages might be awarded by a New York state court, and the parties' contract itself was silent on the subject. *Id.* at 61. The Court based its decision on an inquiry into whether the parties intended to exclude or include punitive damages from arbitration proceedings, eventually concluding that (Cont'd)

whether an award is rationally derived from the parties' contract, or whether it is contrary to express contractual provisions.[41] Thus, we must examine first whether the parties contracted to restrict arbitration awards to damages ordered by a court of law applying the substantive law of Louisiana. Neither the employment contract nor the arbitration agreement specifically mention, or limit, the kind of damages that may be awarded in the arbitration proceedings. Both agreements do, however, express the parties' intention to abide by the Rules of the ICC, which specify that arbitrators may award any remedy or relief that they deem scriptural, just and equitable, and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. In making their decisions, the arbitrators shall consider, but are not limited by, the remedies requested by the parties.[42]

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(Cont'd)
punitive damages were permissible—stating that "if contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration." *Id.* at 59, 64. Although this case differs slightly, in that NCS does not argue that Louisiana law purports to limit the kinds of damages available in *arbitration* proceedings, the Court made clear that the relevant inquiry was whether the parties intended to exclude punitive damages from consideration in arbitration proceedings, not whether such damages were available under state law.

41. *Terra W. Townhomes*, 996 P.2d at 871.

42. ICC Rule 40(b). Moreover, ICC rule 42 states that "[s]hould these Rules vary from state or federal arbitration statutes, these Rules
(Cont'd)

We hold that the contract's silence on limitations of damages, when contrasted with the Rules' express, broad provision for any manner of damages the arbitrator deems acceptable, demonstrates that the arbitrator's award of damages, even if not available under substantive Louisiana state law, was not expressly contrary to the parties' contract. The arbitrator's award is also rationally derived from the employment agreement. That contract does not state broadly that Louisiana law will govern every aspect of the employment relationship between the parties, only that "[t]his contract shall be interpreted under the laws of the state of Louisiana as if jointly authored by the parties."[43]

More importantly, the employment contract states the overarching principle that the parties will be governed by biblical provisions, both in the substantive terms of their employment relationship and in their arbitration and mediation proceedings. Specifically, employees are required

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shall control except where the state or federal rules specifically indicate that they may not be superseded." The MUAA contains no restrictions on the amount or kinds of awards available in arbitration.

43. NCS appears to rely on our language in *Prescott I* to the effect that Louisiana law applies to this dispute as support for its argument that the arbitrator exceeded his powers when he awarded of damages inconsistent with Louisiana law. *See* 369 F.3d at 496. This argument is specious: In *Prescott I*, we inquired only "which state's law governs *the interpretation of the arbitration contract*" and decided that, consistent with the above-cited contractual language, Louisiana law governed the interpretation of the contract's language. *Id.* (emphasis added).

to affirm that (1) they are "Born Again" Christians, (2) they have a sense of God's will and that their presence at NCS is at God's direction, (3) they will manifest the highest Christian virtue and personal decorum in and out of school, and (4) they will attend and financially support a local church with fundamental beliefs that are in agreement with the doctrinal statement of Northlake Christian School. Furthermore, each employee promised to abide by the precepts of Matthew 18: 15- 17 and Galatians 6:1, and to resolve all differences, including those not submitted to arbitration, according to biblical principles. This is the provision of the contract that the arbitrator held NCS to have violated, and this is the violation for which the arbitrator assessed damages against NCS.[44]

The parties thus evinced a clear desire to incorporate biblical provisions into their everyday employment dealings. Whether such a contract is sustainable under Louisiana law is not a question for this court: The parties freely and knowingly contracted to have their relationship governed by specified provisions of the Bible and the Rules of the ICC, and the arbitrator's determination that NCS had not acted according to the dictates of Matthew 18 relates to that contract. Further, the Rules of the ICC indisputably

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44. Although dicta in *Prescott I* stated that the arbitrator's decision was based on "prefatory language" in the employment agreement that applied only to the parties' choice of arbitration and mediation rules, in fact, such language is also included within the substantive terms and conditions of employment in the employment contract. *See* 369 F.3d at 494 n. 2. As that dicta was not necessary to our decision in *Prescott I*, it has no binding effect on our instant review of the district court's decision on remand.

contemplate that an arbitrator will have extremely broad discretion to fashion an appropriate remedy; and no language in the parties' contracts expresses their intent to depart from the Rules of the ICC. We hold that the arbitrator's award of damages is rationally derived from Prescott's employment contract with NCS and not contrary to any express contractual provisions, either biblical or secular. Consequently, NCS is not entitled to vacatur of the arbitrator's decision on this ground and the district court's order enforcing the arbitration award cannot be vacated for the reasons asserted by NCS.

4. Misconduct by Arbitrator

Finally, NCS asserts that the arbitrator's award should be vacated because he participated in *ex parte* communications with Prescott's counsel, neglected to hear material evidence pertinent to the controversy, and refused to disclose circumstances likely to affect partiality. NCS contends further that, under either the FAA or the MUAA, the district court had the power and duty to vacate the arbitration award because of the arbitrator's apparent bias.

NCS includes only two sentences on this argument in its brief, electing instead to direct our attention to documents that it filed in the district court, which documents NCS purports to adopt by reference in its brief. But, an appellant must include the substance of its arguments in the body of its brief: We will not consider arguments presented only in earlier filings.[45] As we do not consider arguments that are

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45. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir.1993) (holding that appellant had abandoned arguments as "[h]e requests, in part, the adoption of previously filed legal and factual arguments

(Cont'd)

not adequately briefed to us,[46] we decline to entertain NCS's assertions on this point.

## III. CONCLUSION

The district court did not clearly err in deciding to credit Prescott's version of events over that of NCS and, accordingly, to hold that the parties did not expand the scope of judicial review over the arbitration award. Neither did the district court abuse its discretion in refusing to order a jury trial to ascertain the meaning of the party's hand-written addenda to their arbitration agreement, because, as a matter of law, NCS was not entitled to demand a jury trial on this or any other issue, save only the making of the contract which was not questioned. The district court correctly determined that NCS had not demonstrated entitlement to vacatur of the arbitration award on any of the narrow grounds on which a court of law may vacate such an award. The district court's order enforcing Prescott's arbitration award is, in all respects, AFFIRMED.

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(Cont'd)
in his objections to the magistrate judge's report and in various state court pleadings. He specifically states that he will not repeat such claims. Yohey has abandoned these arguments by failing to argue them in the body of his brief."). In *Yohey*, we also noted that to permit the appellant to incorporate arguments from other briefs would lengthen a brief already at the 50-page limit. *Id.* NCS's brief, likewise, is already quite lengthy at 62 pages.

46. *L & A Contracting Co. v. S. Concrete Servs.*, 17 F.3d 106, 113 (5th Cir.1994) (holding appeal to be abandoned because appellant cited no authority in a one-page argument); Fed. R.App. P. 28(a)(9)(A) (requiring argument to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

## APPENDIX B — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED OCTOBER 29, 2004

**UNITED STATES DISTRICT COURT**
**E.D. LOUISIANA**

No. Civ. A. 01-475.
Oct. 29, 2004

Pamela L. **PRESCOTT**

**v.**

**NORTHLAKE CHRISTIAN SCHOOL**, et al.

ORDER AND REASONS

BARBIER, J.

This case involves an employment dispute submitted to arbitration pursuant to an employment contract. Plaintiff seeks to confirm the arbitrator's award in her favor, and the defendant seeks to vacate the award. Ordinarily there is no right to appeal an arbitration award except on very narrow grounds not present in this case. Although the printed form arbitration agreement did not contain any specific appeal provisions, the parties inserted the handwritten phrase "No party waives appeal rights, *if any*, by signing this agreement". At issue is whether the parties intended to expand the scope of judicial review.

*Appendix B*

The Court conducted an evidentiary hearing (as ordered by the Fifth Circuit)[1] to divine the parties' intent. After considering the testimony and documentary evidence submitted during the evidentiary hearing, the Court concludes that when there was finally a meeting of the minds and the final version of the arbitration agreement was signed, the parties intended the added language to insure that both parties preserved and did not waive only the limited appeal rights that otherwise existed under the applicable arbitration statutes. Accordingly, for the reasons previously stated in this Court's earlier opinions,[2] the arbitrator's award must be confirmed.

## BACKGROUND

Pamela Prescott and Northlake Christian School entered into an employment contract dated May 21, 1999. This contract required all employment related disputes to be submitted to "biblically-based" mediation and arbitration. The arbitration process was to be conducted in accordance with the *Rules of Procedure for Christian Conciliation* ("ICC Rules"), written by the Institute for Christian Conciliation ("ICC"). The ICC Rules are set forth as Part IV of the Guidelines for Christian Conciliation published by the ICC, which is based in Billings, Montana. The parties agreed that this would be the sole method for resolving claims and disputes between them, and expressly waived the right to

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1. *Prescott v. Northlake Christian School*, 369 F.3d 491 (5th Cir.2004).

2. Rec. Docs. 34 and 49.

file a lawsuit, except to enforce a legally binding arbitration award.

In March, 2000, an employment dispute arose between the parties. Prescott filed the instant lawsuit asserting various claims for breach of contract and employment discrimination under Title VII. The School responded by filing a motion to compel arbitration in accordance with the employment contract. Over Prescott's objection, this Court granted the School's motion, ordered the parties to arbitrate their dispute and stayed the case.[3]

On March 16, 2002, the parties attempted to mediate their dispute, without success. Per their agreement, the parties then proceeded immediately to arbitration. The arbitration hearing began on March 18, 2002 and lasted six full days. On June 14, 2002, the arbitrator issued his judgment, finding in favor of Prescott on her breach of contract claim and awarding damages in the sum of $157,856.52. The arbitrator also awarded defendant $786.46 for past due COBRA payments owed by Prescott. Prescott filed a motion in this Court to confirm the arbitrator's award. The School moved to vacate and set aside the award. On November 13, 2002, this Court confirmed the arbitration award in favor of Prescott, applying the narrow and limited scope of appellate review provided for in the applicable arbitration statutes.

On appeal, the Fifth Circuit reversed and remanded for a determination by this Court of whether the parties intended

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3. *Prescott v. Northlake Christian School*, 2001 WL 740506 (E.D.La.2002).

to expand the otherwise limited appeal rights under the terms of the arbitration agreement. More specifically, the appellate court found that insertion of the handwritten phrase "No party waives appeal rights, if any, by signing this agreement" into an otherwise printed form agreement made the parties' intention ambiguous. Accordingly, the Fifth Circuit remanded "for the district court to take evidence on and contractually interpret the circumstances surrounding the making of the (handwritten) provision," and then "re-evaluate" the School's motion to vacate under the appropriate standard.[4]

## DISCUSSION

On September 10, 2004, this Court conducted an evidentiary hearing to receive extrinsic evidence on the parties' intentions with regard to the scope of appellate review. The Court now makes the following findings of fact and conclusions of law.

The original, printed form for the arbitration agreement was prepared and furnished by the Institute for Christian Conciliation, a private entity conducting the mediation and arbitration pursuant to the employment contract between Pamela Prescott and Northlake Christian School. The original form did not expressly provide for any appeal rights whatsoever, although it incorporated by reference the Rules for Christian Conciliation published by the ICC.

Prescott initially resisted submitting her employment dispute to arbitration, but ultimately agreed to participate

4. 369 F.3d at 498

once the ICC and the School advised that, since she had signed an employment contract requiring her to arbitrate and had been ordered by this Court to arbitrate, the ICC and the School intended to go forward with the arbitration whether she participated or not.

Before the final agreement was signed by both parties on the morning the mediation/arbitration[5] process began, there had been several attempts between the ICC and the parties to reach a mutually acceptable arbitration agreement. Initially, Prescott returned the ICC form with several modifications, including the handwritten sentence "No party waives appeal rights by signing this agreement". Prescott testified that she added this language because she was concerned that the printed document did not expressly allow any appeal rights whatsoever, and she wanted to preserve at least the limited appeal rights provided for in the arbitration statutes. The added language was not acceptable to the School, however. Instead, the School, through its attorney, signed the original printed form with no changes.

Subsequently, and still prior to the date of the mediation/arbitration, Prescott's attorney once again submitted a modified version of the printed document. Once again, the same handwritten language ("No party waives appeal rights by signing this agreement") was inserted. Again, this inserted language was not acceptable to the School, which again submitted the original printed form with no changes or insertions. It is clear that there was no meeting of the minds

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5. The parties agreed to mediate first and, if unsuccessful, to proceed immediately to arbitration.

as to the arbitration agreement as of that time. Nonetheless, the ICC case manager decided to go forward with scheduling of a date for the mediation/arbitration to commence.

On the morning that the mediation/arbitration was set to begin, the ICC conciliator met separately with the opposing parties, attempting to get a signed arbitration agreement that was mutually acceptable. Prescott, through her attorneys, once again inserted the handwritten language "No party waives appeal rights by signing this agreement". Prescott and her attorneys then signed the modified document. When the modified document was presented by the conciliator to the opposing side, the School's attorney had the words "if any" inserted within the handwritten language previously added by Prescott.[6] With the School's requested insertion, the handwritten language now read "No party waives appeal rights, *if any,* by signing this agreement." The final agreement was then signed by board members representing the School and its attorney. The parties proceeded to mediation, and then arbitration under this signed agreement.

At the evidentiary hearing on September 10, 2004, Prescott testified that the conciliator came back and explained that the School's attorney had insisted on adding "if any" because he did not believe there were any appeal rights. On

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6. This handwritten insertion by the School's attorney resulted in a final handwritten provision drafted jointly by the parties, not unilaterally by Ms. Prescott. Accordingly, there is no basis to construe the provision and any ambiguities therein against Ms. Prescott. In the prior appeal of this case, the appellate court was apparently under the mistaken impression that Ms. Prescott was solely responsible for the inserted language. 369 F.3d 491, 497, n. 10.

the other hand, board member Boyd Leahy testified at the evidentiary hearing that the School's attorney wanted to add "if any" to make it clear that there would be no appeal rights if the parties were successful in mediation. In other words, the School argues that the inserted language was intended to preserve "all appeal rights" from an arbitration award, but no appeal rights from a successful mediation. The Court finds this explanation makes no sense because it is obvious that a successful mediation would mean there would be no need for an appeal. The only point of including any language regarding appeal rights was to clarify the parties' intention in the event there was an arbitration hearing and decision. The Court finds that Prescott's explanation is more credible and logical. The sequence of events as to how and when the handwritten words were inserted into the final, signed agreement, and at whose insistence, lead the Court to conclude that the intention of the parties was to make clear that only those appeal rights provided in the applicable arbitration rules were not waived.[7]

The School argues that other extrinsic evidence suggests the parties intended to preserve "all" appeal rights. For example, the printed language provided for confidentiality of anything occurring during the mediation or arbitration process. Prescott and her attorneys deleted this provision insofar as it pertained to arbitration. In addition, Prescott's attorneys retained, at their expense, an official court reporter to record the entire arbitration hearing. And during the hearing, there were several references by both attorneys to a

7. The Arbitration Agreement states that the agreement is subject to arbitration pursuant to the Montana Arbitration Act, Title 27, Montana Code Annotated. Rec. Doc. 22, Exh. B, p. 2.

possible appeal. Considering the totality of the evidence, the Court does not find that these matters prove there was an intent to expand the scope of appellate review beyond that otherwise provided in the applicable arbitration rules. Although the scope of appellate review provided for under the Montana statute is limited, it is not non-existent. Under the MUAA an arbitration award must be confirmed unless a party makes a timely application to vacate, modify or correct the arbitration award. Mont.Code Section 27-5-311. Judicial review under the MUAA is strictly limited.[8] A reviewing court is not permitted to review the merits of the controversy. The party seeking to vacate, modify or correct the arbitration award has the burden of alleging and proving that one of the statutory grounds exists. In this case, the School seeks only to vacate the arbitration award, not to modify or correct it. Under the MUAA, a court may vacate an arbitration award if:

> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) there was evident partiality, corruption or misconduct by the arbitrator;
>
> (c) the arbitrator exceeded his powers;

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8. Initially, the School argued that the Court's review is governed by the Federal Arbitration Act (FAA), 9 U.S.C. Sec. 1, et. seq. As recognized by the Fifth Circuit, the parties contractually adopted the arbitration procedures set forth in the MUAA. 369 F.3d 491, 496. However, since the FAA and the MUAA contain nearly identical limitations on the scope of judicial review, the result in this case would not be changed by application of the FAA.

> (d) the arbitrator refused to postpone the hearing or refused to hear evidence material to the controversy, or otherwise so conducted the hearing so as to prejudice substantially rights of a party. [9]

Considering the language of the agreement itself and the totality of the extrinsic evidence submitted, and construing the agreement in accordance with Louisiana's principles of contract construction, the Court concludes that, in the final version of the agreement signed by both parties, the handwritten language "No party waives appeal rights, if any, by signing this agreement" was intended only to clarify and make express that neither party waived whatever appeal rights were otherwise provided by the applicable ICC and MUAA arbitration procedures. Under both the MUAA and the ICC rules, there are only limited appeal rights. It is true as the School argues, and as recognized by the Fifth Circuit in the earlier appeal of this case, that under Louisiana law, "[a] provision susceptible of different meanings must be interpreted with the meaning that renders it effective and not with one that renders it ineffective."[10] A court should not neutralize contract terms or treat them as "mere surplusage."[11]

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9. Mont.Code Sec. 27-5-312(1)

> These are potential issues that might arise during an arbitration hearing and, in that circumstance, an official record of the proceedings might be useful or necessary in connection with a party's application to vacate or modify the arbitration award pursuant to the MUAA.

10. La. Civ.Code Ann. art. 2049 (West 1987).

11. *Lambert v. Maryland Casualty Co.*, 418 So.2d 553, 559-60 (La.1982) (citations omitted).

But the Court concludes that although perhaps it was not necessary to include the handwritten provision at all, it was not "mere surplusage" from the perspective of a layperson such as Pamela Prescott. Prescott was concerned that the lack of any express statement in the original printed form arbitration agreement might waive even the limited appeal rights under the ICC rules and the MUAA. She wanted a statement inserted to clarify that she did not intend to waive all appeal rights. On the other hand, the School (which did not wish to expand the limited appeal rights otherwise provided) was concerned that Prescott's insertion of "No party waives appeal rights by signing this agreement" was overly broad and might allow Prescott to appeal an adverse decision by the arbitrator on grounds not ordinarily permitted under ICC rules or the MUAA. To make clear its intentions, the School's attorney insisted on inserting "if any" within Prescott's language. The phrase "if any" is simply shorthand for "if there are any" and implies the possibility of "none". In other words, the parties agreed to not waive appeal rights *if there are any.* This implies an understanding that there may in fact be none, but to the extent appeal rights otherwise exist, they are not waived. The suggestion by the School that it intended the handwritten insertion to mean that there would be no appeal rights from a successful mediation, but full appeal rights from an adverse arbitration award lacks credibility and makes no sense in the context of this case. Obviously neither party would appeal a *successful* mediation, because their dispute would have been amicably resolved. If the mediation was unsuccessful, then they had agreed to proceed immediately to binding arbitration. So the context

of the language regarding appeal rights could only relate to an appeal from an adverse arbitration decision.[12]

The School also relies on various unrelated forms or standing orders[13] of this Court or the Fifth Circuit which use the phrase "if any" in different contexts, arguing that the phrase "is not used to limit but to unlimit". For example, paragraph 9 of the RICO Standing Order requires the RICO plaintiff to "Describe what benefits, *if any*, the alleged enterprise receives from the alleged pattern of racketeering activity."[14] According to the School, this means, "describe *all* such benefits".[15] But it also implies there may be none.

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12. It is important to note that Prescott was already contractually bound to arbitrate according to ICC rules, and had been ordered by this Court to arbitrate her employment dispute. The arbitration process could and would have proceeded without regard to whether she signed the new agreement or participated in the proceedings. See: ICC Arbitration Rule 37 (Exhibit 35, Bates page no. 265). The ICC and the School had already advised Prescott that they intended to go forward with or without her. The School had no need or incentive to make any concessions to Prescott relating to the terms or conditions for the arbitration process. If Ms. Prescott refused to sign the arbitration agreement, the ICC was prepared to conduct the arbitration pursuant to its own Arbitration Rules, incorporated by reference in the employment contract Prescott had signed. (Exhibit 22). The ICC panel had already refused two motions by Prescott's attorneys to continue the hearing, stating that it intended to proceed with the arbitration as scheduled on March 18, 2002. (Exhibits 27 and 30).

13. Rec. Doc. 85, Exhs. 43-45.

14. Rec. Doc. 85, Exh.43.

15. Rec. Doc. 86, p. 20.

In other words, describe all such benefits, *if there are any such benefits.* The School's reliance on these various forms and standard orders is misplaced.

For reasons stated more fully in its previous rulings,[16] the Court finds that Northlake Christian School has failed to carry its burden of showing that the arbitration award should be vacated. Plaintiff's arbitration award must be confirmed.

For these reasons,

IT IS HEREBY ORDERED that Plaintiff's Motion to Confirm Arbitration Award (Rec.Doc. 22) is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to Reopen Court Proceedings and Appeal to Trial Court of Arbitration Award/Motion to Vacate or Modify Arbitration Award (Rec.Doc. 21) is DENIED.

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16. *Prescott v. Northlake Christian School*, 244 F.Supp.2d 659 (E.D.La.2002); *Prescott v. Northlake Christian School*, 2003 WL 282330 (E.D.La.2003).

## APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MAY 4, 2004

## UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-30201

PAMELA L. PRESCOTT,

*Plaintiff-Appellee,*

v.

NORTHLAKE CHRISTIAN SCHOOL; *et al.*,

*Defendants,*

NORTHLAKE CHRISTIAN SCHOOL,

*Defendant-Appellant.*

May 4, 2004

Before GARWOOD, JONES and STEWART, *Circuit Judges.*

EDITH H. JONES, *Circuit Judge*:

Northlake Christian School (NCS) attempted to forestall strife with its newly-hired principal Pamela Prescott by entering into an employment contract for "biblically-based mediation" or arbitration under the auspices of the Institute

for Christian Conciliation, these methods being prescribed as the "sole remedy" for any controversy. When the school's relationship with Prescott deteriorated, however, Prescott filed suit. The district court ordered ADR. Mediation occurred, then arbitration; NCS appealed a highly adverse and somewhat dubious award back to the court; NCS appealed to this court; and we are forced to remand for further proceedings. So much for saving money and relationships through alternative dispute resolution. Perfect justice is not always found in this world.

## I. BACKGROUND

NCS hired Prescott as its elementary/preschool principal for the 1999-2000 school year. In a written employment contract, the parties agreed "in conformity with the biblical injunctions of 1 Corinthians 6:1-8, Matthew 5:23,24, and Matthew 18:15-20 . . . that any claim or dispute arising out of, or related to, this agreement or to any aspect of the employment relationship" would be referred to "biblically-based mediation" and, if unsuccessful, binding arbitration. The agreement specified that "the arbitration process shall be conducted in accordance with the current Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation." Moreover, the parties waived "their respective rights to file a lawsuit against one another in any civil court for such disputes, except to enforce a legally binding arbitration decision."

In the spring of 2000, NCS told Prescott her contract would not be renewed for the following year and instructed her to vacate the premises of the school by March 31, 2000.

She was placed on administrative leave for the duration of the school year contract and was paid her full salary and benefits throughout the contract term.

In February 2001, Prescott filed suit against NCS, its board of directors, and its chief administrator in federal court. She asserted claims for Title VII gender discrimination, sexual harassment, and retaliation, violation of the Louisiana Whistleblower Protection Act, La. R.S. § 23:967 (2003), and breach of contract. NCS moved to compel arbitration. The court granted NCS's motion, stayed Prescott's suit, and administratively closed the case.[1]

To submit their dispute to arbitration, following the failure of mediation, the parties executed a form mediation/arbitration agreement furnished by the ICC. They agreed to be governed by ICC rules, which included conducting the arbitration pursuant to the Montana Uniform Arbitration Act ("MUAA"). Most important, the parties interlineated the agreement in two places. First, the agreement originally provided that all communications, written or oral, "between the parties during the mediation and/or arbitration process shall be inadmissible in a court of law or for legal discovery." The parties crossed out the "and/or arbitration" language, presumably making such communications admissible in a court of law. Second, on Prescott's initiative, the parties added and initialed a hand-written provision, which stated: "No party waives appeal rights, if any, by signing this agreement."

1. On the eve of arbitration, Prescott voluntarily dismissed with prejudice all claims against the individual defendants. Thus, only NCS and Prescott remain parties to this litigation.

*Appendix C*

After an unsuccessful attempt at mediation, the parties proceeded before a single ICC arbitrator. Over a six-day period, the arbitrator heard testimony from a multitude of witnesses and reviewed the evidence and affidavits submitted by the parties. On June 14, 2002, the arbitrator determined that NCS had failed to resolve its conflict with Prescott in accordance with Matthew 18, and other biblical scriptures, which he held were incorporated into the terms of Prescott's employment contract.[2] The arbitrator rendered judgment in favor of Prescott on her breach of contract claim and awarded her $157,856.52 for damage to her reputation and for future loss of income.[3] The arbitrator also awarded NCS $786.46 for past due COBRA payments. NCS filed a motion to reconsider with the ICC administrator.[4] The arbitrator denied the motion.

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2. Curiously, the arbitrator employed the biblical passages that were cited as prefatory principles in the contract in order to *supersede* the actual contract language, which gave Prescott no right to be employed beyond a one-year term. This result appears incompatible with Louisiana law. *See Barbe v. A.A. Harmon & Co.*, 705 So.2d 1210 (1998).

3. The arbitrator rejected Prescott's Title VII claims, as well as her claim under the Louisiana Whistleblower Protection Act. Prescott did not appeal the rejection of these claims to the district court.

4. NCS also filed other post-arbitration motions with the arbitrator. NCS filed an objection to ex parte communications, a motion for a new hearing, and a motion for disclosure contending that new evidence had been uncovered that demanded a hearing. The arbitrator summarily denied these motions on July 31, 2002.

NCS next moved to vacate the arbitration award in federal court, and argued, inter alia, that the handwritten amendments to the arbitration agreement expanded the federal court's scope of review. Under this expanded scope of review, NCS urged the district court to vacate the arbitration award, as a matter of law, because Prescott was not wrongfully terminated, and she was not entitled to damages. The district court disagreed and concluded that the "if any" language "merely preserves whatever appeal rights are statutorily granted under the MUAA." The district court rejected NCS's substantive claims under the MUAA's narrow scope of review. NCS now appeals that decision to this court.

## II. STANDARD OF REVIEW

On a motion to vacate an arbitration award, we review the district court's findings of fact for clear error and questions of law de novo. *Harris v. Parker College of Chiropractic*, 286 F.3d 790, 791 (5th Cir.2002). Normally, the district court's review of an arbitration award, under the Federal Arbitration Act ("FAA"), is "extraordinarily narrow." *Antwine v. Prudential Bache Securities, Inc.*, 899 F.2d 410, 413 (5th Cir.1990)(stating that, under the FAA, "courts should defer to the arbitrator's decision when possible") (citations omitted).[5] The scope of

5. Under the FAA, a district court may vacate an award only if: (1) the award was procured by corruption, fraud, or undue means; (2) there is evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exceeded their powers. 9 U.S.C. § 10(a)(2001); *Harris*, 286 F.3d at 791. An arbitration award may also be vacated if in making the award the arbitrator acted with "manifest disregard for the law." *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 761 (5th Cir.1999).

judicial review is equally narrow under the MUAA.[6] The MUAA also permits modification of an arbitration award under limited circumstances.[7]

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6. Under MUAA, a court may only vacate an arbitration award if:

> (a) the award was procured by corruption, fraud, or other undue means; (b) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (c) the arbitrators exceeded their powers; (d) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of 27-5-213, as to prejudice substantially the rights of a party; or (e) there was no arbitration agreement and the issue was not adversely determined in proceedings under 27-5-115 and the party did not participate in the arbitration hearing without raising the objection.

Mont.Code. § 27-5-312(1)(2003).

7. An arbitration award may be modified or corrected, under the MUAA, only if:

> (a) there was an evident miscalculation of figures or mistake in the description of any person, thing, or property referred to in the award; (b) the arbitrators awarded upon a matter not submitted to him and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (c) the award is imperfect in a matter of form not affecting the merits of the controversy.

Mont.Code § 27-5-313(1)(2003).

*Appendix C*

In the instant case, we are called upon to determine whether the parties' arbitration agreement expanded the scope of judicial review beyond that provided in the MUAA. The district court's interpretation of a contract, including the initial determination whether the contract is ambiguous, is a conclusion of law. *American Totalisator Co., Inc. v. Fair Grounds Corp.*, 3 F.3d 810, 813 (5th Cir.1993); *Thrift v. Hubbard*, 44 F.3d 348, 357 (5th Cir.1995). If the contract is ambiguous, then "the determination of the parties' intent through the extrinsic evidence is a question of fact." *Watkins v. Petro-Search, Inc.*, 689 F.2d 537, 538 (5th Cir.1982).

## III. DISCUSSION

NCS offers several arguments on appeal: (1) the arbitration agreement expanded the scope of judicial review; (2) the arbitrator erred, as a matter of law, in ruling that NCS breached its contract with Prescott and that Prescott was entitled to damages; and (3) the arbitrator violated several provisions of the MUAA.[8] Because we are uncertain whether, and if so, to what extent, the arbitration agreement expanded the scope of judicial review, we vacate the district court's judgment and remand for further proceedings.

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8. More specifically, NCS argued, in addition to the scope of review issue, that the arbitrator erred in: (1) finding that NCS breached its contract with Prescott; (2) awarding damages that were unauthorized under Louisiana law; (3) exceeding his contractually limited authority; and (4) engaging in misconduct by participating in ex parte communications with Prescott's counsel, neglecting material evidence, and refusing to disclose circumstances likely to affect impartiality. The district court found against NCS on all grounds, and NCS has appealed each assignment of error to this court.

*Appendix C*

In a broad sense, this dispute is subject to the FAA. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478-79, 109 S.Ct. 1248, 1255-56, 103 L.Ed.2d 488 (1989)(finding that the FAA applies to "a written agreement to arbitrate in any contract involving interstate commerce"); 9 U.S.C. § 2 (2000). Thus, the FAA, and the body of federal substantive law interpreting it, would typically govern the resolution of this dispute. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983)(recognizing that the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act").

The FAA, however, does not bar parties from structuring an arbitration by means of their contractual agreements, nor does it preempt all state laws regarding arbitration. *See Harris*, 286 F.3d at 793 (permitting contractual modification concerning standard of review); *Specialty Healthcare Mgmt., Inc. v. St. Mary's Parish Hosp.*, 220 F.3d 650, 654 (5th Cir.2000)(recognizing that the FAA "does not preempt all state law related to arbitration agreements"). We held in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir.1995), that "a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties."

A threshold issue is which state's law governs the interpretation of the arbitration contract. Prescott's employment agreement provided that the arbitration "was

subject to . . . the Montana Arbitration Act, Title 27, Montana Code Annotated." The district court viewed this as a choice-of-law provision concerning the standards for arbitration. NCS contends, correctly, that the reference to the MUAA is not a choice-of-law provision, and that Louisiana law controls the interpretation of the arbitration agreement as an addendum to the employment contract. In *Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60, 64 n. 5 (5th Cir.1987), this circuit determined that contractual language authorizing arbitration in New York City did not constitute a New York choice-of-law provision. Instead, "the provision merely requires that the *procedures* that the arbitrators use be in accordance with the laws applicable to New York City." *Id.* at 65 (emphasis in original). Accordingly, the MUAA controls the procedures attendant to the arbitration, but not the interpretation of the underlying contract.

Louisiana law applies to this dispute between a Louisiana resident and a Louisiana school concerning the proper interpretation of a Louisiana contract.[9] The employment contract contained a valid provision requiring all disputes to be adjudicated under the laws of Louisiana. In Louisiana, "[w]here parties stipulate the State law governing the contract, Louisiana conflict of laws principles require that the stipulation be given effect, unless there is statutory or jurisprudential law to the contrary or strong public policy

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9. *See Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 452 (5th Cir.2001) (federal court must apply choice-of-law rules of state in which it sits); *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, (5th Cir.1988) ("Louisiana provides that the law of the place of contracting determines the nature, validity, and construction of that contract.") (citations omitted).

considerations justifying the refusal to honor the contract as written." *Delhomme Industries, Inc. v. Houston Beechcraft, Inc.*, 669 F.2d 1049, 1058 (5th Cir.1982)(quoting *Associated Press v. Toledo Invs., Inc.*, 389 So.2d 752, 754 (La.App.1980)). The parties' additional pre-arbitration agreement in no way detracts from that choice; alternatively, it is independently subject to Louisiana law.

The inquiry thus becomes whether the parties' arbitration agreement contemplated expanded judicial review. Contrary to the district court's determination, this matter cannot be resolved on the face of the agreement and requires further factual development. Under Louisiana law, "interpretation of a contract is the determination of the common intent of the parties." La. Civ.Code Ann. art. 2045 (2003). However, "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." La. Civ.Code Ann. art. 2046 (2003). Only if the contract is ambiguous may the court look beyond the four corners of the document. *Taita Chemical Co., Ltd. v. Westlake Styrene Corp.*, 246 F.3d 377, 386 (5th Cir.2001).

In a handwritten additional paragraph, NCS and Prescott agreed that "[n]o party waives appeal rights, if any, by signing this [arbitration] agreement." The district court concluded that this language merely preserved whatever appeal rights the MUAA already granted to the parties. This conclusion is far from self-evident. In *Gateway*, the arbitration agreement provided that "[t]he arbitration decision shall be final and binding to both parties, except that errors of law shall be subject to appeal." 64 F.3d at 996. The court concluded that

this language "expanded review of the arbitration award by the federal courts." *Id.* This court reached the same result in *Harris*, where the agreement provided that "[t]he Award of the Arbitrator shall be binding on the parties hereto, although each party shall retain his right to appeal any questions of law, and judgment may be entered thereon in any court having jurisdiction." 286 F.3d at 793. While the language in *Harris* and *Gateway* is more straightforward, it can certainly be argued that by adding this language to a form contract that otherwise contained no provision concerning appeal of an arbitration award, the parties here intended to expand the scope of judicial review. Such an interpretation heeds the principle that "[a] provision susceptible of different meanings must be interpreted with the meaning that renders it effective and not one that renders it ineffective." La. Civ.Code art. 2049 (2003). The district court's interpretation would seem to render the handwritten modification surplusage, and therefore meaningless.[10]

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10. Furthermore, the instant case is materially distinct from *Action Indus., Inc. v. U.S. Fidelity & Guaranty Co.*, 358 F.3d 337 (5th Cir.2004). There, the court determined "that the parties' intent to replace the FAA's vacatur standard [could] not be gleaned from the Agreement's general choice-of-law provision, which provide[d] that Tennessee law govern[ed] contractual execution and performance." *Id.* at 341. Thus, the arbitration clause did "not in any way modify or replace the FAA's rules." *Id.* However, in the instant case, the contractual modification is not premised on a general choice-of-law provision or a vague reference to a particular state's arbitration statute. Rather, the parties expressly adopted the ICC arbitration agreement and amended that agreement by inserting tailor-made appellate review language. Thus, the provision at issue is fundamentally different than the provision struck in *Action Industries*

(Cont'd)

Even if the parties intended to affect the scope of judicial review with this language, however, their precise intentions concerning expanded review are ambiguous. We reach this conclusion mindful that "[e]ach provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La. Civ.Code Art. 2050. Thus, it is also significant that the parties decided to permit "a court of law" to review written and oral communications (*i.e.*, the record evidence) from the arbitration; this modification of the contract's form language amplifies their apparent intent to expand the scope of judicial review. Reinforcing Prescott's apparent intention to preserve expanded appeal rights (it was her attorney who insisted upon these special conditions), Prescott had a court reporter transcribe the arbitration proceedings.

These contractual tidbits strongly suggest that the parties intended judicial review to be available beyond the normal narrow range of the FAA or MUAA. Because they cannot compel a firm decision on the face of the contract, however, we find it ambiguous and must remand for the district court to take evidence on and contractually interpret the circumstances surrounding the making of the provision. The court will then be required to re-evaluate under the appropriate standard NCS's challenges to the arbitration award.

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(Cont'd)

and more closely resembles the provisions approved of in *Gateway* and *Harris*. Last, as *Action Industries* recognizes, "we construe ambiguous contractual language against the party who drafted it." *Id.* (citing *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.*, 141 F.3d 243, 249 (5th Cir.1998)). Therefore, we must construe the provision, and any ambiguities contained therein, against Prescott.

*Appendix C*

## IV. CONCLUSION

For the reasons stated above, we VACATE the district court's order confirming the arbitration award and REMAND for further proceedings consistent with this opinion. VACATED and REMANDED.

CARL E. STEWART, *Circuit Judge*, dissenting:

I respectfully dissent from the panel majority's conclusion that a clause that provides "No party waives appeal rights, if any, by signing this [arbitration] agreement," when considered on its face or when read in harmony with the other provisions of the parties' agreement, is ambiguous regarding the parties' intent to contract for a more expansive scope of review than that otherwise available pursuant to the FAA or the MUAA. The majority accurately sets forth the facts and procedural history of this case, so I will not repeat them here.

The majority concludes that this clause, which speaks only in terms of "appeal rights" and contemplates that none may exist, at least arguably evidences the parties' intent "to expand the scope of judicial review." The majority reaches this conclusion even though the clause neither identifies a question for our consideration that would not otherwise be reviewable under the FAA or MUAA nor refers to any particular level of scrutiny pursuant to which such review should be conducted. The majority further finds that certain "contractual tidbits ... strongly suggest that the parties intended judicial review to be available beyond the normal narrow range of the FAA or MUAA." Finally,

notwithstanding its uncertainty regarding whether and to what extent the parties' agreement expanded the scope of judicial review, the majority concludes that this ambiguity requires that we remand the case to the district court to adduce evidence of the parties' intentions and "interpret the circumstances surrounding the making of this provision." Because I find the majority's determinations irreconcilable with the terms, context, and purpose of the parties' arbitration agreement and our recent clarification in *Action Industries, Inc. v. United States Fidelity & Guaranty Co.*, 358 F.3d 337 (5th Cir.2004), regarding the level of exactitude required to opt-out of the narrow scope of review available under the governing arbitration statute, I must disagree with all three conclusions.

The majority begins its analysis by rejecting the district court's determination that the reference to the Montana Uniform Arbitration Act contained in the parties' submission agreement constituted a "choice-of-law" provision governing the scope of judicial review of the arbitration award in the instant case. This provision provided that "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE MONTANA ARBITRATION ACT, TITLE 27, MONTANA CODE ANNOTATED." The district court reasoned that the MUAA, like the FAA, sets forth only limited grounds for vacatur or modification of an arbitration award, and that to "expand the scope of judicial review beyond that allowed by the law governing the arbitration process, the arbitration agreement must expressly and unambiguously evidence the parties' intent to do so." Finding no such express and unambiguous statement in the submission agreement's additional, handwritten provision

that "No party waives appeal rights, if any, by signing this [arbitration] agreement," the district court concluded that the clause simply retained the few grounds for disturbing an arbitration award available under the MUAA.

According to the majority, our opinion in *Valero Refining*, 813 F.2d at 64-65 & n. 5, compels the conclusion that the MUAA clause "controls the procedures attendant to the arbitration, but not the interpretation of the underlying contract." The latter question, the majority reasons, must be determined under Louisiana law, in accordance with the general choice-of-law provision contained in the parties' employment agreement. While I agree that we must resort to state rules of construction to resolve any conflict between purportedly competing contractual provisions, the majority's reliance on *Valero Refining* is misplaced, and injects ambiguity into an agreement which, when properly considered as a whole, has none. And, even if I were to agree that the parties' intention regarding the applicable scope of judicial review is ambiguous, our opinion in *Action Industries, Inc.*, 358 F.3d at 341-42, establishing that a clause must be clear and unambiguous to expand the statutory scope of review, makes it patently apparent that the clause at issue here fails to overcome the governing arbitration statute and its attendant narrow grounds for vacatur. I will address each of these points in turn.

In *Valero Refining*, we rejected the assertion that a clause stipulating that the "laws of the City of New York" would govern the arbitration proceeding[1] invoked the then-

1. The clause at issue provided: "Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York pursuant to the laws relating to arbitration there in force." *Valero Refining*, 813 F.2d at 64 n. 5.

controlling law of the Second Circuit, of which New York is a part, that RICO claims were not subject to arbitration. *Id.* at 65. We reasoned that the agreement's reference to New York law was not a choice-of-law clause requiring application of the Second Circuit's rule regarding arbitrability, but rather "merely require[d] that the procedures that the *arbitrators use* be in accordance with the laws applicable to New York City." *Id.* (emphasis added). The clause at issue in *Valero Refining*, however, is not comparable to the specific reference to the MUAA in the submission agreement before us. In *Ford v. NYLCare Health Plans of the Gulf Coast Inc.*, 141 F.3d 243 (5th Cir.1998), relied upon by the district court, we held that a virtually identical reference to state law—in that case, to the Texas General Arbitration Act[2]—unambiguously governed nothing less than every aspect of the arbitration under the agreement at issue, rejecting the assertion that the clause could be read to make the "TGAA applicable only to the procedural aspects of arbitration." *Id.* at 249 (concluding that the reference to the TGAA unambiguously expressed the parties' intent to supercede the FAA rules with Texas arbitration law).

It is clear under *Ford* that the MUAA clause sufficed to supercede the FAA's scope of review, and at least provisionally set forth the grounds for vacatur or modification of the arbitration award in the instant case. *See id.*; *Action Industries*, 358 F.3d at 342-43 (recognizing that an

2. The arbitration agreement stated that arbitration of any claim must be settled "in accordance with the Texas General Arbitration Act" and, as in this case, contained a notice providing: "THIS AGREEMENT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION ACT." *Ford*, 141 F.3d at 249.

agreement's specific reference to a state arbitration statute would suffice to opt-out of the FAA standards for vacatur). The question thus becomes whether other language in the parties' agreement sufficed to overcome the MUAA clause. *See Ford*, 141 F.3d at 249. In this case the parties' rights and duties with respect to arbitration are set forth in two separate agreements: the employment contract, which contains an arbitration clause and incorporates the ICC's arbitration rules by reference, and a submission agreement, which supplements the parties' more general commitment to resolve their disputes through arbitration by defining the issues to be submitted to the arbitrator.

Like the MUAA clause, the clause at the core of this dispute, "No party waives appeal rights, if any, by signing this agreement," appears in the submission agreement. On its face, this "no waiver" clause indicates that the parties intended only to retain whatever appeal rights they had at the time they added that clause. The majority, rejecting this view as "not self-evident," finds that NCS's argument that such an interpretation renders the "no waiver" clause surplusage is sufficiently compelling to create an ambiguity in the parties' agreement. The majority is further persuaded by the purported absence of any other "provision concerning an appeal of an award" in the parties' agreement. I disagree with both aspects of the majority's rationale and its ultimate conclusion that such an ambiguity exists.

First, the majority's reading—that the clause does not simply retain the MUAA standards—renders the language "if any" surplusage, and it is the very inclusion of the phrase "if any" that evidences the parties' express contemplation

that the entire clause may be redundant. As the majority acknowledges, under Louisiana law, an interpretation of a contract that has the effect of rendering a provision superfluous or meaningless must be avoided. *See* La. Civ.Code Art. 2049. Thus, we cannot, as the majority has done, leave out terms of a contract or render them surplusage and then declare that there is an ambiguity, itself a result of refusing to give effect to the contract's express provisions. Second, contrary to the majority's conclusion, the arbitration agreement at issue contains numerous provisions concerning "appeal rights," all of which reaffirm the parties' intent that any arbitration award would be final and binding and not subject to appeal "except as provided by law." In particular, the parties' employment agreement provided that the parties "waive their respective rights to file a lawsuit against one another in any civil courts for such disputes, *except to enforce a legally binding arbitration decision.*" (emphasis added). The employment agreement also incorporated by reference the ICC rules, which in turn provided that "[t]he arbitrator's decision is final" and "shall be legally binding on the parties, except as provided by law," and, more specifically, "cannot be considered or appealed except as provided by Rule 41 (Request for Reconsideration [by the arbitrator] ) and/or civil law." ICC Rules 40.E, G. Clause 2 of the submission agreement similarly provided that the arbitration would be "legally binding." In Clause 3, the submission agreement reiterated that the parties "agreed to 'abide by and perform any decision rendered by the arbitrator' " and that the parties "realize that arbitration will be the exclusive remedy for this dispute and that [they] may not later litigate these matters in civil court." In short, these provisions establish the agreement's primary emphasis on the exclusivity and finality

of arbitration as a means of resolving the instant dispute between the parties. All of these provisions support the conclusion that the parties' handwritten "no waiver" clause merely sought to preserve whatever narrow grounds for challenging an arbitration award that were available to them. Nor do the aptly-labeled "contractual tidbits" cited by the majority compel the contrary conclusion that the parties' added language intended to expand the scope of judicial review. That the parties' agreement authorized "a court of law" to review written and oral communications might, as the majority concludes, support the notion that they contemplated an expanded review. However, it is also wholly consistent with an intent to allow consideration of the arbitration award only under the narrow grounds available under the FAA, or, in this case, the MUAA, which, for example, permit vacatur where an arbitrator's failure to consider relevant evidence has substantially prejudiced a party. *See* 9 U.S.C. § 10(a)(3); Mont.Code § 27-5-312(1)(d). In the absence of record evidence, or the authorization to review written and oral communications, the reviewing court would encounter great difficulty in assessing an alleged error by the arbitrator based on this ground.

Similarly, Prescott's insistence that the arbitral proceedings be transcribed do not persuade me to lean in favor of finding an intent to expand the scope of judicial review. The application of a narrow scope of review (limiting the grounds open for our consideration) or a deferential standard of review (setting forth how hard we must look at such grounds) does not obviate the need for a record. *See, e.g., Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 396 (5th Cir.2003) (stating that, "[g]iven the

limited record available to this court, absent further documentation in the record suggesting a willful inattentiveness to the governing law, it would be difficult to find that the arbitration panel acted with manifest disregard for an applicable legal principle without undermining our stated deference for the arbitration process"). In fact, the ICC Rules pursuant to which the parties' arbitration was conducted specifically allow such transcription, yet, as noted above, also expressly state that any resultant award "shall be legally binding on the parties" and "cannot be considered or appealed except as provided by Rule 41 (Request for Reconsideration [by the arbitrator] ) and/or civil law." ICC Rules 40.E, G. Admittedly, the grounds available for disturbing an arbitration award pursuant to the FAA or MUAA are narrow; however, when they apply they do not provide for no review at all.

Finally, even if I were to agree with the majority that the "no waiver" clause at issue is ambiguous regarding the parties' intent to expand judicial review, the very existence of ambiguity means that at best this clause may be deemed a failed attempt to alter the scope of review otherwise available under the MUAA. Our recent decision in *Action Industries*, 358 F.3d at 340-41, confirms the district court's rationale that the contractual language required to opt-out of the governing statutory scope of review must be "clear and unambiguous." *See id.* at 341-42 (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); *Hughes Training Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir.2001)). In *Action Industries*, we rejected the assertion that a general choice-of-law provision referencing Tennessee law, without reference to the Tennessee

Uniform Arbitration Act, was insufficiently clear and unambiguous to evidence the parties' intent to opt-out of the FAA's grounds for vacatur of an arbitration award. *Id.* at 342. Notwithstanding the appellant's argument that this intent could be "gleaned" from this choice-of-law provision, we did not remand the matter to the district court to adduce further evidence regarding the parties' intent. Rather, once we determined that the parties' agreement did not specifically reference state arbitration law or specify, "with certain exactitude how the FAA [vacatur] rules [were] to be modified," we simply concluded that it failed as a matter of law to depart from the governing standard.

As examples of clauses that met the requisite level of exactitude, the *Action Industries* panel pointed to the clauses in *Gateway*, 64 F.3d at 996, and *Harris*, 286 F.3d at 793, noting that in each case we held that the language employed "evinced the parties' clear intent to depart from the FAA's vacatur standard." *Action Industries*, 358 F.3d at 342. Although the majority concedes that the "no waiver" clause at issue in this case is not "as straightforward" as the clauses we considered in *Gateway* and *Harris*, I cannot agree, in light of our opinion in *Action Industries*, that the lack of specificity in the "no waiver" clause can lead us to conclude anything other than it does not suffice to expand the scope of judicial review beyond the grounds available under the MUAA. Moreover, a close reading of *Harris* reveals that the opinion presciently recognized that to the extent a clause neither identifies with specificity a question for our consideration not otherwise available under the governing statutory standard nor refers to any particular level of scrutiny pursuant

to which such review should be conducted, that clause will not successfully expand the scope of review.

In *Harris*, we refined *Gateway*'s holding by establishing that an agreement that merely reserves the "right to appeal any questions of law," does not necessarily mean that *de novo* review applies to all issues on appeal. *See Harris*, 286 F.3d at 793-94. At issue in *Harris* was the intended meaning of the phrase "questions of law." *Id.* The *Harris* panel found that the phrase was equally susceptible to two reasonable and conflicting interpretations, noting that it "could reasonably be interpreted to encompass solely 'pure' questions of law, [as the appellee argued,] or it could be read broadly, to encompass mixed questions of law and fact," as urged by the drafter-appellants. *Id.* at 793-94. Consequently, the *Harris* panel concluded that the reference to "questions of law" was ambiguous, and construed the phrase against the drafter-appellants.[3] *Id.* at 794. Significantly, the panel concluded that this not only dictated that *de novo* review apply only to pure questions of law, but that, "with respect to questions of fact and mixed questions of law and fact, *we apply the default standard of review, vacating only for manifest disregard of the law, or on the grounds listed in the FAA.*" *Id.* (emphasis added).

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3. Unlike *Harris*, however, in the instant case the parties' employment contract provided that "This contract shall be interpreted under . . . Louisiana [law] *as if jointly authored by the parties*," rendering it inappropriate to construe the added "no waiver" language against the drafter of that clause. (emphasis added). Of course, we only resort to this principle of contractual interpretation where the contested language is ambiguous and, as I have discussed above, I do not agree that any such ambiguity surrounds the "no waiver" clause at issue in this case.

*Appendix C*

We also found that the canon of contract construction requiring courts to "give effect to all contract provisions so that none will be rendered meaningless" compelled our narrow interpretation of the clause. *Id.* We noted in *Harris* that because the arbitrator's legal conclusions "were intimately bound up with the facts," none of his findings would be final if we were to review *de novo* all mixed questions of fact and law. *Id.* Thus, we reasoned, a broad reading of "questions of law" to encompass mixed questions would render meaningless "the provision that the arbitrator's award should be binding." *Id.* Accordingly, we concluded that "questions of law" had to be construed as referring to only "pure" legal questions in order to give effect to this finality provision. We further pointed out that parties seeking "more extensive review of an arbitrator's award may do so by specifying the standard of review in the arbitration agreement." *Id.* (citing *Hughes Training*, 254 F.3d at 593 (enforcing a provision that stated that "in actions seeking to vacate an [arbitration] award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury")). The *Harris* panel noted that unlike in *Hughes*, "[i]n the present case, the arbitration agreement simply did not specify that the standard of review for anything other than pure questions of law had been altered." *Id.*

In light of our circuit precedent as clarified in *Harris* and *Action Industries*, I cannot agree with the majority's view that a clause which, by the majority's own admission is at best ambiguous regarding the parties' intent to expand judicial review, requires remanding the matter for further

inquiry into the circumstances surrounding its drafting. In *Harris* and *Action Industries*, we did not remand the matter for the district court to take evidence on the parties' intent; rather, we established that the applicable statutory standard would govern to the extent of the deficiency in specificity. *See Harris*, 286 F.3d at 794; *Action Industries*, 358 F.3d at 342. Because I find that by its terms, purpose, and context, the "no waiver" clause does not unambiguously expand the scope of judicial review and that a contrary interpretation would render other provisions pertaining to the finality of the award meaningless, I would affirm the district court's confirmation of the arbitration award. As the majority concedes, a remand would eviscerate whatever vestiges of efficient dispute resolution still exist in this case, an eventuality that is wholly inconsistent with the parties' undisputed intent to resolve their claims exclusively through arbitration. The parties have already asserted their respective conflicting interpretations to the district court and this court, and I am unpersuaded that they will shed any greater light on their respective positions should they find themselves before the district court for a reprise. I further note that it is inevitable that one side in an arbitration would be dissatisfied with the result. Absent clear and unambiguous contractual language to the contrary, however, I find that the scope of our review is limited to consideration of the narrow grounds for vacatur or modification of the award that exist at law. For these reasons, I respectfully dissent.

**APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 10, 2005**

**IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

No. 04-31182

PAMELA L PRESCOTT

Plaintiff - Appellee

v.

NORTHLAKE CHRISTIAN SCHOOL; ET AL

Defendants

NORTHLAKE CHRISTIAN SCHOOL

Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

**ON PETITION FOR REHEARING**

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

*Appendix D*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge